No. 144.

Brief of Taylor for P. E.

TERM No. 144. REG. No. 1

IN THE

Filed Nov. 3, 1898.

# Supreme Court of the United S



DARWIN C. ALLEN,

Plaintiff in

VS.

SOUTHERN PACIFIC RAILROAD COMPA

Defendant

## Brief of Argument of Plaintiff in

EDWARD R. TAYLOR,

IN THE

# SUPREME COURT

OF THE

UNITED STATES.

DARWIN C. ALLEN,
*Plaintiff in Error,*

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
*Defendant in Error.*

## Brief of Argument of Plaintiff in Error.

The case comes here by writ of error to the Supreme Court of the State of California. The folfowing are

### THE FACTS OF THE CASE.

In February, 1888, plaintiff and defendant executed some eighty-four instruments, a specimen copy of which is set out in the record.[1] The instru-

[1] Trans. of Record, folio 22.

ments are in form contracts on the part of the Southern Pacific Railroad Company to sell, and on the part of Darwin C. Allen to buy, described tracts of land at a specified price. One-fifth of the price, and one year's advance interest on residue was paid at time of execution of the instruments; a like advance interest on residue to be paid each year; and the residue itself to be paid on or before February 1, 1893.[2] In the meantime, the buyer might take posession of the lands, *if he could*, and hold them, *if he could*, both at his own risk and expense,—the seller declaring that "said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession."[3] The seller further agreed that, "upon the punctual payment of said purchase money, interest, taxes, assessments * * * the party of the first part will, after the receipt of a patent therefor from the United States, upon demand and surrender of this instrument, execute and deliver to the party of the second part, his heirs and assigns, a grant, bargain and sale deed of said premises."[3A] But "that the party of the first part claims all the tracts hereinbefore described as a part of a grant of

[2]Folio 23. [3]Folio 25. [3A]Folio 23.

lands to it by the Congress of the United States;[4] that patent has not yet issued to it for said tract; that it will use ordinary diligence to procure patents for them; that, as in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore, *nothing in this instrument shall be considered a guarantee or assurance that patent or title will be procured;* that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay (without interest) to the party of the second part all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for."[5]

In August, 1892, the Southern Pacific Railroad Company, as plaintiff, instituted an action against Darwin C. Allen, as defendant, in a court of first instance of California, setting out in full the contracts above epitomized, and alleging the failure of the buyer to pay the second, third and fourth year's interest therein required to be paid.[6] The complaint alleged the plaintiff's ownership and seizure in fee of the lands at all times, but was

[4]The lands are not within the granted limits, but are in the indemnity belt adjoining. The contracts, it will be noticed, are misfits as to the latter class of lands, and evidently were prepared for sales of land within the granted limits, to which title of such portions as had not been previously aliened or incumbered passed upon location of route of road, but for which patents issued only upon construction and acceptance of stated sections of the road.

[5]Folio 25. [6]Folio 18.

silent as to the receipt or non-receipt of patents.[7] It did not offer the return of the moneys paid by the buyer. Although the contracts contained no clause forfeiting those moneys, nor giving a cause of action of any sort because of the non-payment of interest, the complaint, nevertheless, was framed on the theory that the non-payment of interest (the principal not being yet due) gave the seller a right of action for annulment of the contracts and forfeiture of the buyer's rights under them, and to all moneys paid on their account. Accordingly its prayer was for judgment "that there is due from said defendant to said plaintiff under and by virtue of said contracts the sum of $4,343.19, the same being for the second, third and fourth year's interest on said contracts. * * * That in case said defendant fails to pay to plaintiff the amounts found due * * * then the defendant and all persons holding said premises under defendant shall be forever barred and foreclosed of all claim, right or interest in said lands and premises * * * and to a conveyance thereof * * * *and that said contracts be declared null and void.*"[8]

The answer and cross-complaint of Allen did not deny the execution of the contracts nor the non-payment of interest, but defended on the ground of the invalidity of the contracts, and of

[7]Folio 15. [8]Folio 20.

the false representations of plaintiff as to its title to the lands in those contracts described; defendant alleging that plaintiff had neither title, claim nor interest in the lands under its claimed grant by the Congress of the United States or otherwise. Alleged also that because of that lack of title he had been unable to get possession of the lands or to receive any benefit from them or from the contracts, and that he had paid to plaintiff as part purchase price of the lands the sum of $6,618.25. He therefore asked the rescission, and gave his consent to plaintiff's prayer for the annulment of the contracts conditionally upon the return of his money payments on their account.[9]

Some months after the maturity of the contracts the case was tried, and on October 30, 1893, the trial court rendered its decision, that portion bearing on contested points being as follows:

"That plaintiff is, and always has been, willing and ready to perform said contracts in all their covenants and conditions on its part to be performed upon full performance by defendant of the covenants and conditions of said contracts upon his part to be performed and fulfilled. That the lands and premises therein described were portions of the public domain of the United States and were granted to plaintiff by an act of the Congress of the United States, entitled 'An Act granting lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast;' approved July

[9]Folios 29-31.

27, 1866. That all of said lands, save Sec. 5, in Township 23 south, range 19 east, M. D. M., are situated within a belt more than 20 miles and less than 30 miles from plaintiff's railroad, generally known as the indemnity belt; the said Sec. 5, being within 20 miles of said railroad.

"That the loss to plaintiff of odd numbered sections within said granted limits, *i. e.*, within 20 miles of said railroad, because of the various exceptions and reservations in said Act provided for, is fully equal to all the odd numbered sections within said indemnity belt.

"That on March 19, 1867, an order was made by the Secretary of the Interior of the United States withdrawing or purporting to withdraw from sale or settlement under the laws of the United States, all of said lands situated in said indemnity belt; and that on August 15, 1887, another order was made by said Secretary of the Interior, revoking, or purporting to revoke, said first named order, and restoring said lands to the public domain for the usual sale and settlement thereof. * * * That plaintiff is the owner of said lands in fee under the provisions of said Act of Congress; that patents or a patent therefor, have not yet been issued to plaintiff by the Government of the United States; that it has not been finally determined that patents or a patent shall not issue therefor, or for any part thereof, but proceedings are now pending before the proper department of the Government of the United States, instituted by plaintiff to obtain patents or a patent for said lands and premises, and the whole thereof."[10]

Judgment was thereupon ordered and entered in favor of the plaintiff therein as prayed for in

[10]Folios 39-41.

its complaint, without requiring plaintiff to return any of the moneys received from the defendant. An appeal from that judgment was made by the defendant therein to the Supreme Court of California, and was argued and submitted to Department No. One of that Court. In June, 1895, a decision was rendered by that Department of the Court modifying the judgment appealed from to the extent of ordering the restoration of all money paid by the buyer, less interest, etc., the Court holding that the covenant of the contracts to pay for in full, and that to convey the lands were interdependent, and that, as the time for closing the transactions had arrived and passed without power in the seller to convey, the contracts had expired.[11]

In July, 1895, the judgment of the Court in Department was, on petition of the Railroad Company, set aside, the case transferred to the Court in Bank, and there argued and submitted, In April, 1896, the judgment here sought to be reviewed was rendered, affirming the judgment of the trial Court. The Court in Bank differed with that in Department (by a bare majority) in holding that the covenants to pay for, and to convey the lands were *independent*, and that the buyer must pay the entire price at the date called for in the contracts, although the seller could give nothing

[11]Trans., p. 20.

in return—neither title, assurance of title, nor possession of the lands so paid for.[12]

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## SPECIFICATION OF ERRORS.

The case in the Supreme Court of California was based on the judgment roll,[13] *i.e.*, the pleadings and judgment. And as the judgment included the "decision" or findings of facts of the trial court which, with the admitted averments of the pleadings, constituted a full statement of the case, no formal specification of errors in transcript of record or in brief was in that Court required.

In this Court the formal assignment of errors contained in the record is also a specification of the errors we here complain of.

It may be remembered that the judgment forfeited the buyer's rights to a conveyance of the lands, and annulled the contracts, without requiring the restoration to the buyer of the moneys paid on account of those promised conveyances. The non-return of his money is the buyer's only grievance.

Assigning, therefore, the failure of the judgment to require a return of the portion of the purchase price paid as the ultimate error, the intermediate and subsidiary errors of the Court may be specified as follows:

[12]Trans., p. 15. [13]Folios 45, 46.

1. In declaring and adjudging that the Southern Pacific Railroad Company was ever ready or willing to perform the covenants or conditions of the contracts set out in its complaint, or that said Company was ever ready or willing to, or could possibly convey the lands in said contracts described to said Darwin C. Allen.

See Trans. of Record, folio 39.

2. In declaring and adjudging that said Railroad Company was at any time the owner of said lands in fee or otherwise, or ever had any possession of, or interest in, or claim to them.

See Trans., folio 41.

3. In declaring and adjudging "that it had not been finally determined that patents or a patent shall not issue" to said Railroad Company for said lands.

See Trans., folio 41.

4. In declaring and adjudging that said Railroad Company "had not been guilty of any want of ordinary diligence in instituting or prosecuting proceedings to obtain said patent or patents."

See Trans., folio 41.

5. In failing to adjudge and declare that the cause of action in the complaint herein alleged authorized a judgment for a *rescission* of said contracts only.

6. In failing to adjudge and declare that said contracts were void and unenforceable because without consideration for the promise of the buyer; (*a*) the seller having no assignable or vested interest in the lands to be conveyed, and (*b*) the seller not having agreed absolutely to sell or convey said lands.

7. In failing to adjudge and declare that the contracts could not be specifically enforced

against the buyer because (*a*) of lack of mutuality of remedy, since they could not be enforced against the seller, (*b*) the seller had no marketable title, and (*c*) misrepresentation of seller as to its title in claiming the lands to be a part of a grant to it.

8. In failing to adjudge and declare that the contracts had by their own terms become void (*a*) through limitation of time within which patents for the lands should be procured, and (*b*) through the final determination that patents for the lands would not issue to the Railroad Company.

Necessarily involved in the judgment of the California Supreme Court, none formally passed upon in the opinions rendered, but all presented and argued by counsel, were the questions upon which we depend to give this Court jurisdiction on writ of error.

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## THE FEDERAL QUESTIONS.

First. Did the Southern Pacific Railroad Company have any alienable or contractual interest in the lands described in the contracts of sale?

The answer to that question involves the construction of

1. Act of Congress of July 27, 1866, entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast."[14]

[14]Stat. at Large, p. 292.

2. The order of the General Land Office of the United States of August 15, 1887,[15] revoking its prior withdrawal of said lands from private entry pending the Railroad Company's contingent right of selection for indemnity, and now restoring lands to the public domain for the usual sale and settlement thereof.

Second. Were the lands in the contracts described any "part of a grant of lands to the Southern Pacific Railroad Company by the Congress of the United States?"

The answer to that question involves the construction of the Act of Congress of July 27, 1866, before mentioned.

Third. Was not the before mentioned order of the General Land Office revoking the withdrawal for railroad indemnity selection and subjecting the land to private entry a "final determination" that patents for that land would not issue to the Southern Pacific Railroad Company under the Act of July 27, 1866?

The answer to that question involves the construction of

1. The Act of July 27, 1866, the order of the General Land Office mentioned, and

2. Acts of Congress granting or bearing upon the grant of authority to the General Land Office to make such withdrawals and restorations of

[15]Trans., folio 40.

lands within railroad indemnity limits, as follows:

Act of April 21, 1876,[16] (Sec. 1), entitled "An Act to confirm pre-emptions and homestead entries of public lands within limits of railroad grants, where such entries have been made under regulations of the Land Department."

Act of Jan. 13, 1881,[17] entitled "An Act for the relief of certain settlers on restored railroad lands."

Act of March 3, 1887,[18] entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads," etc.

Sec. 2218 of Revised Statutes of United States.

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## RELATION OF FEDERAL QUESTIONS TO THE CASE.

First. As to the seller's lack of alienable or contractual interest in the lands:

1. If (as we contend the fact to be) the Railroad Company was a stranger to—had no *vested interest* in the lands, the promises of the buyer were (*a*) void *ab initio*, or (*b*) voidable, *i. e.*, unenforceable against him at any time prior to the seller's acquisition of title.

2. If (as we contend the fact to be) the seller

[16]19 Stat., 35. [17]21 Stat., 315. [18]24 Stat., 556.

had no *marketable* title to the lands, this action against the buyer for specific performance on his part could not be sustained.

Second. As to the seller's misrepresentation of title:

1. If (as we contend the fact to be) the lands in the contracts described were not "a part of a grant of lands to it by the Congress of the United States" the seller, by declaring in the contracts that those lands were a part of such grant, misrepresented its title and thereby made the contracts voidable or, at least, unenforceable under the provisions of the California Civil Code.

Third. As to the effect of the restoration of the lands to the public domain:

1. If (as we contend the fact to be) the order of the General Land Office restoring the lands to the public domain for private entry was in effect a refusal of the Railroad Company's claim to them, and a final determination that patents for them would not be issued to that Company, the contracts had by their own terms expired.

"First, 1, *a* and *b*."

"A mere possibility, not coupled with an interest, cannot be transferred."

Sec. 1045 of Civil Code of California.

That section is a codification of the common law rule, save that it applies to law and equity alike.

The rule is illustrated in a recent case in this Court where it appeared that the plaintiff in the trial Court had selected and applied for the purchase from the State of Texas of more than a million acres of land at the price of fifty cents an acre, and soon thereafter had contracted with defendant to convey to him all his rights to the lands at an advance of twenty-five cents an acre. The action was to recover that advance price. This Court found that at the time of the contract the seller had yet acquired no vested interest in the lands and, therefore, no assignable estate. The Court said:

"The claim, therefore, of having acquired any right or title in or to the whole amount of the lands by the proceedings taken was manifestly groundless. The plaintiff below could not convey any proprietary interest in the whole amount of the lands desired until the required payment therefor was made [to the State], and any promise by the defendant below, Telfener, to pay to him twenty-five cents, or any amount, for an acre of *such hoped-for, and not acquired*, land, or for any less quantity, was worthless, without any value or consideration." * * *

"The claim that the plaintiff below, Russ, had parted with a valuable property, for which he was entitled to a judgment exceeding half a million of dollars from Count Telfener, for having transferred to him *his hopes of securing a million acres* of land from the State, for which he did not hold any promise or obligation of the State, does not merit consideration. As a claim it rests upon no solid foundation."

Telfener v. Russ, 162 U. S., 170, 176, 183.

We need not dilate upon that point.

"2."

"An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give the buyer a title free from reasonable doubt."

Sec. 3394 of Civil Code of California.

That section, also, is a codification of the common law, and is here cited only to show the fixed rule in California.

We need refer to but one case in this Court:

"The legal title to these lots is therefore still in the bank, and may be subject to the trust declared in the deed, from anything that appeared upon the trial. And to allow the bank to recover the purchase money, and turn the defendant over to a court of chancery to obtain title, would be going farther than any known principles in Courts of law would warrant. * * * To substantiate the present action under such circumstances, would be compelling the defendant to take a lawsuit instead of the land for which he contracted."

Bank etc. v. Hagner, 1 Pet., 455, 468.

California adjudications are of course controlled by the Section of the Civil Code cited, but we append a couple of illustrative cases:

Sanders v. Lansing, 70 Cal., 429;

Burks v. Davies, 85 Cal., 110.

"Second, 1."

"Specific performance cannot be enforced against a party to a contract in any of the following cases:

"1. If he has not received an adequate consideration for the contract.

"2. If it is not, as to him, just and reasonable.

"3. If his assent was obtained by the misrepresentation," etc.

Sec. 3391 of Civil Code of California.

"Third."

The point that the contracts had by their own terms expired, needs only an explanation. The contracts declare that as the Railroad Company's claim to the lands may not be recognized by the United States, it will upon final determination that patents for the lands will not issue to it, return to the buyer all moneys paid on account of the purchase. The lands were outside the granted limits, but within the indemnity belt withdrawn from private entry in 1867 by the Secretary of the Interior to meet the contingent selection of the Railroad Company under direction of the Secretary of the Interior. But in 1887 the lands were restored to the public domain and to right of private entry. And that restoration was, we claim, a refusal of the Secretary of the Interior to approve the selection by the Railroad Company of those lands as indemnity under the Act of Congress of July 27, 1866, and a final determination that patents for them would not issue to the Com-

pany. Of course if it was such a determination the contracts by their express terms became thereby revoked, and the buyer entitled to a return of his money.

None of the foregoing Federal questions were formally mentioned in the opinions by the California Supreme Court rendered. Indeed that Court was precluded from entertaining them, since the judgment of the trial Court, affirmed by the appellate Court, in finding that the lands "were granted to plaintiff by an Act of Congress of the United States * * * approved July 27, 1866," and "that plaintiff is the owner of said lands in fee under the provisions of said Act of Congress," and that "plaintiff is ready to perform said contracts," left no basis for those questions.

Thus far our presentation of the case has been confined to the Federal questions necessarily involved in, and their relation to the judgment here under review; whether passed upon correctly or incorrectly by that judgment will be presented in their order among all the questions arising in the case.

## THE WHOLE CASE AND QUESTIONS INVOLVED.

The complaint alleged $4,343.19 to be due as *interest* on part purchase price (not then due) of land, and asked that in case that interest be not paid within thirty days the buyer be barred of all right in the lands under the contracts of purchase, and the contracts annulled. Nothing was said about the money paid on account of purchase, asking its forfeiture, nor offering its return. By the contracts alleged, the Southern Pacific Railroad Company in form agreed to sell lands it did not own, *in the event only* of it becoming the owner through patents from the United States. Expressly provided that it should not be held bound to acquire the lands nor title to them from any source, and that in case it was finally determined that the United States would not give it patents the trade would be "off," such moneys as had been paid returned, and the contracts "be null and void." The time or manner of the determination that patents would not issue to the Railroad Company was not expressed, but the entire purchase price must be paid, and the transaction closed within five years from the date of the contracts.

The buyer, answering the complaint, consented to the annulment of the contracts on condition

that $6,618.25 paid by him on account of those contracts be returned. The judgment followed the prayer of the complaint.

Our points for reversal or modification may be epitomized thus:

1. The complaint, and the case made under it, showed at most a cause of action for *rescission* of the contracts. Non-payment of interest on non-due balance of purchase price gave no other relief.

2. As an action for "foreclosure" or specific performance of contract, it could not be sustained:

*a.* Because "the seller could not give the buyer a title free from reasonable doubt."

*b.* Because there was no mutuality of remedy; the seller could not be forced to convey.

*c.* Because of misrepresentation of title by the seller, the contracts declaring the lands to be a "part of a grant of land to it by the Congress of the United States."

3. The contracts were without supporting consideration for the promise of the buyer, and thus void *ab initio:*

*a.* The seller had no assignable, *i. e.*, vested interest in the lands.

*b.* The seller made no absolute promise to sell, and hence the engagements were not bilateral—a promise for a promise—and as unilateral engagements to buy, they had no extrinsic support.

4. The contracts were voidable at the instance of the buyer at any time before the contingent promise to sell became absolute by procurement of patents. The promise of the buyer was at most a continuing offer to buy, subject to recall at any time before being met by an absolute promise to sell.

5. The contracts expired by the limitation of time within which the seller must acquire the lands so as to be enabled to convey them to the buyer at the date fixed for final payment of purchase price:

*a.* By the passage of the time within which the entire purchase price must have been paid, without the ability of the seller to convey or give possession of the lands so to be paid for.

*b.* By the passage of more than a reasonable time within which to procure lands and title, assuming that no time for such procurement was by the contracts expressed or implied.

6. The contracts had by their own terms expired, it having been finally determined that patents would not issue to the Railroad Company:

*a.* By the order of the Secretary of the Interior in restoring the lands to the public domain subject to private entry.

*b.* In contemplation of the requirements of the contracts as to final payment of purchase price.

## I.

**Non-payment of interest, alone, gave no cause of action for forfeiture or foreclosure of the contracts of purchase, nor for anything else save a rescission or, possibly, a money judgment for amount due.**

The principal (balance of purchase price) was not yet due, and there was no provision in the contracts, nor in law, making it due because of non-payment of interest.

Indeed, to the contrary, the contracts provided a penalty of their own for non-payment of interest —loss of right of intermediate possession of the lands.[19] And that penalty must be held exclusive.

In California even a mortgage cannot be foreclosed until the principal debt has, under the express terms of the instrument, become due. Non-payment of interest does not, of itself, make the principal due.

Van Loo v. Van Aken, 104 Cal., 269.

Neither jurist nor law writer has ever declared or intimated that a contract of purchase may be "forfeited" or "foreclosed" because of non-payment of interest on non-due purchase price of the land.

[19]Trans., Fol. 24. And—as if in anticipation of the default—the penalty was in fact imposed; for the buyer had been unable to get possession of the lands. Fols. 29, 39.

Of course, the seller may *rescind* for any breach of the buyer, but in that case he must return everything received under the contract. The decree in this case fits as well a rescission as a forfeiture or foreclosure, save that it does not require a restoration of the buyer's money.

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## II a.

**An action to compel the buyer's performance of a contract of purchase of land, directly or indirectly, by "forfeiting" or "foreclosing" his rights under the contract, cannot be maintained while the seller is without marketable title to the land.**

"An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give the buyer a title free from reasonable doubt."

Sec. 3394 of Civil Code of California.

The contracts here were made and to be performed and are sought to be enforced in California.

That the Railroad Company's title to the lands were not "free from reasonable doubt" will hardly be questioned in this Court. Conceding (argumentatively) all the Company claims, yet it appears that title and possession remained in the United States. For, as this Court declared in

Ryan v. C. P. R. R. Co.,[20] repeated with emphasis in United States v. Missouri Ry.,[21] and announced as an unquestioned principle in N. P. R. R. v. Musser etc. Co.,[22] the title to land within the Railroad indemnity belt remained *undisturbed* in the United States until properly selected by the Railroad Company, *and that selection approved by the Secretary of the Interior.*

Indeed, under this point, we need not go beyond the contracts themselves. They declare that the Railroad Company had no title, would not engage to get title, might be unable to get it, and that when finally determined that title could not be acquired in a designated way, the agreements for sale of the lands should become void.

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## II b.

**This action cannot be maintained, because of lack of mutuality of remedy. The buyer cannot be compelled to buy or pay, because the seller cannot be compelled to sell or convey.**

"Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compelable specifically to perform everything to which the former is entitled under the same obligation, either

[20]99 U. S., 382. [21]141 U. S., 358. [22]168 U. S., 604.

completely or nearly so, together with full compensation for any want of entire performance."

Sec. 3386 of Civil Code of California.

"It is universally admitted that equity will not enforce a contract, where the party asking its enforcement cannot himself be compelled to perform it."

Cooper v. Pena, 21 Cal., 404-11;
Sturgis v. Galindo, 59 Cal., 28;
Makeham v. Parker, 82 Cal., 46-49;
Smith v. Taylor, 82 Cal., 533;
Oullahan v. Baldwin, 100 Cal., 648-54;
Easton v. Millington, 105 Cal., 49;
Barnbury v. Arnold, 91 Cal., 606;
Lattin v. Hazard, 91 Cal., 87.

The last named case is very apposite. A right of way, land for depots, etc., was agreed to be conveyed to a street railway corporation, which in return agreed to construct the road, equip and operate it in a specified way at specified rates for a period of not less than ten years. The road was constructed, equipped and operated as agreed for some years, but before the expiration of the ten years the action was brought to specifically enforce the agreed conveyances. In denying the Railway Company's right to specific performance the Court said:

"The agreement that McLaughlin will operate the road for the stipulated period in the mode agreed upon is a substantial and important part

of the obligation which has not been performed, and of which specific performance cannot be enforced by a decree."

In our case the essential consideration for the buyer's promise to pay was the seller's promise to convey, and no one can suppose that the latter promise can be enforced by a decree. The seller could not convey with or without the spur of a decree.

If it be said that the seller did not promise to convey; that its only absolute promise was to "use ordinary diligence to procure patents," still even that little promise can not be specifically enforced by a decree of Court.

"It is immaterial what constitutes the want of mutuality, whether resulting from personal incapacity, from the nature of the contract, or from any other cause. Whenever the absence of the essential element is ascertained to exist on the part of one of the contractors, and for that reason is incapable of being enforced against him, he will be equally incapable of enforcing the contract against the other party."

Waterman's Spec. Perf. of Cont's, sec. 196.

For illustrations, see

Ib., secs. 197-98;

2 Beach Mod. Eq. Juris., sec. 586, notes;

Fry's Spec. Perf., sec. 286, Am. notes;

Putnam v. Grace (Mass.), 37 N. E., 166;

Maynard v. Brown, 41 Mich., 298;

Pingle v. Conner, 66 Mich., 187-93;

Bean v. Burbank, 16 Me., 458;
Bolles v. Sachs, 37 Minn., 315;
Chicago, etc. v. Dane, 43 N. Y., 240;
Raffalowski v. Am. Tob. Co., 73 Hun., 87;
Miers v. Franklin, 68 Mo., 127;
Campbell v. Lambert, 36 La. An., 35.

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**II c.**

**"Specific performance cannot be enforced against a party to a contract in any of the following cases:**

"1. If he has not received an adequate consideration.

"2. If it is not as to him just and reasonable.

"3. If his assent was obtained by the misrepresentation," etc.

Sec. 3391 of Civil Code of California.

In response to the buyer's defense of misrepresentation of title, the trial Court found:

"That no representations were made by plaintiff to defendant which induced him to enter into the said contracts other than, or different from the facts as the same are recited in said contracts, and said facts as therein recited are true."

But it is the very recitals of the contracts that contain the misrepresentation of title. They declare "that the party of the first part claims all the tracts hereinbefore described as part of a

grant of lands to it by the Congress of the United States." And these lands were no part of the grant made by the Act of July 27, 1866. The lands by that Act granted were the odd numbered sections within twenty miles (in States) on each side of the railroad. The Act plainly intended to limit the subsidy to twenty sections per mile of road, and as the loss to be met within those granted sections by prior alienation could not be then known, to have *granted* the odd sections of the indemnity belt would have been to absolutely increase the intended subsidy by fifty per cent, although the losses intended to be compensated for might not exceed ten per cent of the intended subsidy.

The phrase " lands hereby granted " in Sec. 6 of the Act mentioned has been many times construed by the department having special charge of the matter as meaning the lands within the "primary" or "granted" limits.

6 Dec. of Dept. of Int., 535;
7 ib., 240;
11 ib., 610.

And that construction has been necessarily approved by this Court in its many decisions holding that Railroad Companies had no claim to any part of the indemnity belt until selected by that Company and the selection approved by the Secretary of the Interior.

The form of contracts here used was that prepared apparently for granted lands to which patents had not yet issued, and of course do not fit a contract of sale of lands to which the seller had no legal claim or title. Of course that misrepresentation was a very material one. If part of a grant, the title to the lands had already passed to the Railroad Company, and patents would be merely additional and convenient record evidence of the transfer of title, and one might readily part with his money in return for such an assurance of title, although unwilling to advance a cent in exchange for what this Court has called "such hoped for but not acquired land," as the seller's claim to any special sections of the indemnity belt offered.

Such a misrepresentation of the seller would not only prevent specific performance against the buyer, but was ample cause for the rescission prayed for in his cross-complaint.

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### III a.

### The seller had no assignable nor vested interest in the lands.

The subsidy to the Southern Pacific Railroad Company under the Act of Congress of July 27, 1866, consisted of a present grant of all odd numbered sections within twenty miles, on each side, of the required railroad. In case of the prior

alienage of any of the lands so attempted to be granted, the Railroad Company might, under direction of the Secretary of the Interior, select from odd numbered sections within ten miles of the granted land an area equal to that so lost from the grant. The road was required to be constructed and accepted in twenty-five mile sections, and patents to issue only for lands opposite to, *coterminous with*, and earned by each completed section. The route of the road was from the Eastern boundary of California, Northerly and Westerly to the City of San Francisco, and the road itself was required to be completed by July 4, 1878. It was not completed at that date—is not yet completed.

In April, 1867, a proclamation of the Secretary of the Interior described an indemnity belt to be withdrawn from private entry to meet possible claims of Railroad for lands in lieu of grant losses.[23]

In August, 1887, the order of withdrawal was revoked and the lands restored to the public domain for private entry.[24]

At that time the Railroad Company had been over nine years in default as to completion of the road, and their grant of lands subject to forfeiture.

The contracts here in question were made in February, 1888, a few months after the restoration of the lands to right of private entry.

[23]Dec. Dept. of Int. [24]6 Ib., 84-92.

In September, 1890, Congress passed a general Act forfeiting all land grants to Railroad Companies not then earned.[25]

The record of this case is silent as to what, if any, portions of the required railroad from the Eastern boundary line of California to San Francisco had been completed at time of restoration of lands to public domain, and at time of passage of general forfeiture Act. Indeed the record does not disclose the performance of a single act of the many required to earn either granted or indemnity lands. The only relation of the Railroad Company to the lands as per record is that they are situated within its indemnity belt, once withdrawn from, but afterwards restored to private entry; "that patents or a patent therefor have not yet been issued to plaintiff by the Government of the United States; that it has not been finally determined that patents or a patent shall not issue therefor, or for any part thereof, but proceedings are now pending before the proper Department of the Government of the United States, instituted by plaintiff, to obtain patents or a patent for said lands and premises, and the whole thereof."

Reading that declaration with all its possible implications in favor of the Railroad Company, the statement that proceedings to obtain patents were then pending, and that it had not been

[25] 26 Stat., 496.

"finally determined" that patents would not issue, may be enlarged into the statement that the Railroad had selected or applied for the selection of the lands in indemnity for like lands within granted limits lost to it, and that that selection or application had not been "finally rejected."

That was the situation at the time of the trial—what was it at the time of the execution of the contracts? Did any of the conditions giving the Railroad Company the right of selection of these lands then exist? Had the Company then selected or applied for the selection of these lands as indemnity. Is it credible that such an application could have been made before February, 1888, and not "finally determined" in October, 1893?

But giving every implication, guess, and surmise to the Railroad Company, we still have left us the very pertinent fact that the Railroad Company's application for—its attempted selection of the lands as indemnity had not up to the date of the trial been approved by the Secretary of the Interior. That much has always been conceded by the Railroad Company.

It follows, of course, that when the contracts were executed, and up to date of trial of action, the seller had no vested interest in the lands contracted to be sold. For (and ignoring for the moment the restoration of these lands to the public domain for private entry) no feature of Con-

gressional grants as subsidies to railroad companies has been so firmly fixed by the numerous and uniform adjudications of this Court as that.

**The right of a railroad company to any special parcel of land within the indemnity belt is *initiated* by the Company's *selection* of that parcel as indemnity *and the approval* of that selection by the Secretary of the Interior.**

That principle, first announced in Ryan v. Central Pac. R. R. Co.,[26] was repeated frequently up to Wisconsin Ry. Co. v. Price County,[27] where all prior cases are reviewed, "re-affirmed" (words of syllabus) in United States v. Missouri etc. Co.,[28] and adhered to in North Pacific R. R. Co. v. Musser etc. Co.,[29] the latest expression of this Court on the subject.

"*Until the selections were approved there were no selections in fact*, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the Company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the Courts."

[26]99 U. S., 382. [27]133 U. S., 496. [28]141 U. S., 375. [29]168 U. S., 604, 611.

Wisconsin C. R. v. Price County, 133 U. S., 511, as quoted, and expressly reaffirmed in United States v. Missouri etc. R., 141 U. S., 375, 376.

"Neither is it intended to question the rule that the title to indemnity lands dates from selection and not from grant."

N. P. R. R. v. Musser etc. Co., 168 U. S., 607.

The result of these considerations (even without that of the effect of the order restoring the lands to the public domain for private entry) is, we think, to negative the possibility of the seller of the lands described in the contracts having any vested or assignable interest in them. Compare the situation here with that in Telfener v. Russ.[30]

Here we find at most a promise from the United States to give the Railroad Company such lands as it may, with the approval of the Secretary of the Interior, select. Then a selection by the Company, but a disapproval by the Secretary.

In the Russ case we see a promise by the State of Texas to sell to an applicant such lands as he shall have selected, surveyed, and applied for in a designated manner. Then a selection, survey, and application to purchase described lands in the manner required.

In the latter case this Court said that the applicant there "could acquire no vested interest, that

[30] 162 U. S., 170, 176, 183.

is no legal title to it until the purchase price was paid and the patent of the State was issued to him." In our case this Court has said: "But such promise passed no title, and until it was executed, created no legal interest which could be enforced in the Courts."

Had not Russ more nearly approached a contract capable of being specifically enforced against the State of Texas, than had the Southern Pacific Railroad Company one capable of being so enforced against the United States? Indeed to weaken the Texas case down to the base of ours Mr. Russ should have stated in his contract that as he sometimes failed to get patents from the State despite his apparent right thereto, he would not in this case guarantee a patent or be responsible for the refusal of the State to recognize the validity of the application. It should have also appeared that the proper officer of the State of Texas had *refused* the applications. Then the situation in the two cases would be similar. And here, as there, the Court might say: "Any promise by the defendant below to pay to him twenty-five cents, or any amount, for an acre of *such hoped for, and not acquired land*, or for any less quantity, was worthless, without any value or consideration."

In addition to the foregoing considerations we contend that the act of the Secretary of the In-

terior in revoking the reservation of the lands for indemnity purposes and restoring them to the public domain, severed any connection theretofore possibly existing between land and Railroad Company and left the two utterly unrelated. The force and effect of that act of the Secretary of the Interior is discussed under point VI a, post.

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## III b, and IV.

### There was no promise to sell in support of the promise to buy.

The promise to sell was to become effective only in case the United States gave the Railroad Company patents for the lands. And the Company expressly negatived any obligation on its part to procure, and any responsibility for failing to procure patents.

In form the contracts present an agreement to sell and buy—a bilateral executory contract where the one promise should support the other.

"An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor."

Sec. 1729 of Civil Code of California.

The contracts here do not engage to transfer the title. The sale was to be made on a contingency;

on conditions stated to be beyond the control of either party, and on the happening of an event which might never happen—a common wager contract, in fact.

And a bilateral contract depends for its validity upon two absolute promises, one supporting the other.

"In a bilateral contract both parties must be bound at the same time or neither is bound."

Wald's Notes to Pollack's Contracts, p. 13.

"A promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement."

1 Parson's Cont., *p. 449.

"It (the promise) must not be illusory or dependent upon a contingency, which in fact reserves an unlimited option to the promisor."

3 Am. & Eng. Ency. of Law, 845;

Pollack's Contracts, 44;

Clark's Contracts, 168.

"Mutual promises are concurrent considerations and will support each other unless one or the other be void; in which case, there being no consideration on the one side, no contract can arise."

Story's Contracts, Sec. 447.

The word "void" in that connection means unenforceable.

Siddall v. Clark, 89 Cal., 321.

*Test:* Could the buyer at any time during those long years have had a specific performance of—of what? Of the seller's engagement? The question itself gives answer! There was no engagement. No patent, no promise. Does the seller promise to get patent? No. Says it may not get them, and that, therefore, its promise to sell, if it procures patent, shall not be construed a "guaranty or assurance that patent or title will be procured."

"The record discloses the existence of an executory contract. It is said to be an elementary principle that to render an executory contract valid both parties must be bound. Rathbone v. Warren, 10 John., 587. Now it will be seen that it is provided in this instrument under seal that this 'lease shall not be binding on the said King, in any way, until the said King shall be appointed to, and installed by the proper officers of the Baltimore & Ohio Railroad Company as freight and ticket agent of the said company at Breathedsville station in Washington County, Maryland, on the Washington County branch of the Baltimore & Ohio Railroad.' It is thus apparent that the appellant is entirely free from any and all obligations to be created by this instrument under seal until the happening of an event which has not occurred. The question then to be determined is whether the appellees are bound by a contract during the period while the other party remains exempt from all obligation, and could not be sued for any alleged infraction. No such principle has ever been sanctioned by adjudication when the terms of the contract impose mutual obligations. On the contrary, the Court has said that 'it is cer-

tainly necessary to set out in the declaration a contract binding on both parties, when a suit is instituted to recover damages for the non-performance of the contract.' Berry v. Harper, 4 Gill & J., 470; Lamar v. McNamee, 10 Gill & J., 120. And in Routledge v. Grant, 3 Carr. & P., 267, Best, J., emphatically says: 'It is not just that one party should be bound when the other is not.'

"It is manifest that this is one of those legal principles so well established as to be beyond the scope of controversy. The proper construction of this executory contract is that it was to become binding on both parties when the appellant obtained the appointment he was seeking to obtain. It would become operative as soon as the contingency happened, and not before. As that contingency which was dependent on the action of third parties has not happened, the appellant is free from all obligations, and is, therefore, in no position to maintain a suit against the appellees for an alleged non-performance of a contract by which he is not bound in any respect. He cannot at his own option now impose on them obligations not created by the instrument under seal. As was said by Chancellor Johnson in Duvall v. Myers, 2 Ind. Ch., 405: 'A party not bound by the agreement itself, has no right to call upon the judicial authority to enforce performance against the other contracting party by expressing his willingness to perform his part of the agreement. His right to the aid of the Court *does not depend upon his subsequent offer to perform* the contract on his part, when events may have rendered it advantageous to do so, but *upon its original obligatory character*.'"

King v. Warfield, 67 Md., 246-8-9.

The contracts containing but one absolute promise (the buyer's), that engagement was uni-

lateral and, being without supporting consideration, void, or, at least, unenforceable and subject to revocation at any time before the seller's contingent engagement became absolute by receipt of the patents.

"In a bilateral contract both parties must be bound at the same time, or neither is bound. In a unilateral contract the offeree is not bound to perform at all, nor until performance by him is the offerer bound; but upon performance by the offeree the proposal of the offerer is converted into a binding promise. Thus if A promise B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding."

Wald's Notes to Pollock's Cont., p. 13.

"Until the conditional promise be rendered binding by the act or time on which it is conditional, it may be retracted."

1 Story's Cont., Secs. 569, 572.

"If A promises B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time the operation of the contract or promise is suspended; for, until the performance of the condition of the promise, there is no consideration, and the promise is *nudum pactum*."

Matthewson v. Fitch, 22 Cal., 86, 93-4.

And see

Richardson v. Hardwick, 106 U. S., 252, 255.

The California Supreme Court appears to have accepted those views, so far as the promises to buy and to sell and their consequences are concerned, but decided that the promise to pay was an independent covenant, disconnected with the matter of final purchase or sale, and to be performed in any event, patents or no patents, conveyance or no conveyance; and that, although the uncertain and unenforceable promise to sell would afford no consideration for that independent absolute covenant to pay, the latter was supported by extrinsic and independent considerations, as follows:

"Plaintiff, by its contract, surrendered its right to contract with or sell to any one else, and yielded to defendant the present right of possession which it claimed. These concessions were clearly a detriment to plaintiff, and, in a legal sense, an advantage to defendant; and they therefore furnished a consideration for defendant's promise to pay."[31]

The opinion of the California Court presents that theory of consideration as plausibly and strongly as it is capable of being stated, but, we suggest:

The *premises* are unfounded in (1) that plaintiff below did not (*a*) expressly, nor (*b*) impliedly, surrender its right (?) to contract with or sell to any one else than defendant; nor (2) claim any right to the present possession of the lands.

Also, that, *assuming* the correctness of those

[31]Trans., p. 17.

premises, the conclusions of the Court are faulty, since those assumed acts would afford no consideration for defendant's promise to pay any part of the purchase price of the lands.

1. Surrender of plaintiff's right to sell to other than defendant:

*a.* There is no express surrender.

*b.* Such a surrender is sought to be implied as the necessary result of plaintiff's agreement to sell to defendant. But plaintiff did not agree to sell to defendant. The entire theory of the case, even as treated by that Court, says that plaintiff did not agree to sell the lands. If plaintiff had agreed to sell to defendant, what occasion was there—why this endeavor—to find another and extrinsic consideration for the promise to pay for the lands? An agreement to sell would of itself afford an ample and a legitimate consideration for the promise to pay the price. And, of course, if there was no valid or enforceable agreement to sell to defendant, there was no implied agreement to sell to none other. An unenforceable agreement will no more support a legal or enforceable implication than it would afford a consideration for a counter-promise.

2. Plaintiff below did not claim any right to the present possession of the lands:

*a.* No such claim is anywhere expressed in the contracts or in the case made. To the contrary,

the contracts very plainly repudiate such claim. They say:

"That said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession."

*b.* No such claim can be implied. The only thing affording such implication, even remotely, is plaintiff's expressed permission that defendant might take such possession; but that possible implication is destroyed when, after the permissive clause of the contracts, we read their further declaration last above quoted (which in turn implies that its right of possession, as well as every other right relating to the lands, depended upon its procurement of patents), and consider that in fact the plaintiff had no right to the then present possession of the lands, whether it ever got patents for them or not.

But even assuming that plaintiff below did surrender to defendant its (now-claimed) right to sell to another, and did yield to him its (now-claimed) right of present possession of the lands, neither, nor both of these concessions afford a consideration for defendant's promise to pay. To sustain that proposition it must appear—and it will be sufficient if it does appear (1) that plaintiff had no legal power to sell or contract for the sale of

the lands to anybody, or (2) that it had no right to the then possession of the lands. Either of these established and it follows that the "concessions" were utterly ineffective either to prejudice the plaintiff or benefit the defendant, and, therefore, constituted no consideration for defendant's promise to pay the purchase price of lands not yet agreed to be sold.

What will constitute a consideration for a promise?

Not an unenforceable promise.

Siddall v. Clark, 89 Cal., 321.

Nor an illusory or ineffective promise or act; "some *real* benefit must be conferred on the promissor, or some *real* detriment suffered by the promissee."

Clark's Contracts, p. 164;

Powers v. Chabot, 93 Cal., 266;

Central L. & M. Co. v Center, 107 Cal., 193.

While in mere support of a promise it need not be, yet to warrant a specific performance of that promise (such as is here sought) the consideration must be adequate, *i. e.*, practically equivalent in value to the promise.

Sec. 3391 Civil Code of Cal., before cited.

Governed by these rules, did the Railroad Company's concessions constitute a sufficient consid-

eration for Allen's promise to buy and pay so many thousands of dollars?

The "concessions" are declared to consist of a surrender of the Company's right to sell specified lands to other than Allen, and its yielding to Allen its right to the present possession of those lands.

But we submit that it has sufficiently appeared that the Railroad Company neither agreed to sell, nor had any legal power to sell the lands to anybody. Its engagement with Allen, therefore, was no detriment to it, nor advantage to Allen.

The Railroad Company's lack of present right of possession of the lands is still more apparent. And so its surrender of such now-claimed right could have been of no possible detriment to it, nor advantage to Allen. It may be remembered that the latter never got possession of the lands.

Indeed, we have but to compare the Railroad Company's theory of consideration in this case with the views by this Court expressed in Telfener v. Russ to perceive its weakness. There Russ had taken the required proceedings, and had necessarily expended much money in locating and surveying the lands; here the Railroad Company had done absolutely nothing but wait apathetically for patents—patents for *some* lands, these or others in lieu of claimed losses from its grant.

## V.

**The contracts expired by limitation of time for procuring title.**

*a.* The contracts require payment of balance of purchase price at the expiration of five years from their date.

Under the usual rule requiring payment and conveyance to be concurrent acts, the seller must have been prepared to convey at the expiration of that fifth year.

And as the contracts, in providing that they should be void and any money paid returned when it should be "finally determined" that the seller would not get patents, did not state what should constitute such "determination," they must be construed and controlled by the above considerations—the necessity of procuring title to meet the payment—and, therefore, as impliedly declaring that the passage of five years without receiving patents would be a "final determination" that they would not be given the seller.

That argument is based upon the covenants of sale and purchase being interdependent, and the acts of payment and conveyance concurrent in time, or, at least, so far mutual obligations that payment could not be enforced when it affirmatively appeared that conveyance could not be made.

In apparent acquiescense in that argument, the Supreme Court of California, in support of its judgment, held that the covenants were independent to an extraordinary extent; that the buyer must at the termination of the five years pay in full, although it then appeared that the seller was without title or assurance, and could neither make conveyance nor give possession to the buyer!

The question of dependent or independent covenant in a contract of sale has hitherto been a merely technical, not to say trifling matter. Must it appear by pleading or proof that the plaintiff tendered price or deed, or only that he was ready with price or deed? Courts have differed on that question, but we know of no case nor comment holding or suggesting that in such cases it is not absolutely essential that it appear that the moving party was *ready* to perform upon performance by the other party. Even in this case the pleader was aware of the indispensibility of the requirement, and therefore alleged plaintiff's ownership of the land, and its willingness and readiness to convey. The evidence, of course, overthrew the allegations of the pleading, and the Court passed upon the case made, and not the case alleged.

So that the point here in review is whether a seller may enforce payment from the buyer in a case where the seller has not yet got the thing sold, may never get it, and expressly repudiates

any obligation to get it, or to give it to its buyer?

The proposition involved in an affirmative answer to that question is, in the abstract, most extraordinary, and when applied to business transactions, especially to the transaction here, seems so monstrously unjust, so absurdly unequal in its operation on the parties, that its very announcement should be its refutation.

**1. In the absence from the contracts of an express and clear provision to the contrary, the seller must, either before, or at the time of, or immediately following the payment in full of the purchase price, convey to the buyer the thing bought.**

The California Civil Code seems to make delivery a condition precedent to payment:

"An agreement to buy is a contract by which one engages to accept from another, *and* pay a price for the title to a certain thing."

Sec. 1728.

"An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him, *and* to pay a price therefor."

Sec. 1729.

"An agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property."

Sec. 1731.

Those sections contemplate the delivery to be the first act, but in any event the two acts of delivery and payment must be practically concurrent.

"In contracts of this description the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and *a purchaser might have payment enforced upon him, and yet be disabled from procuring the property for which he had paid.*"

Bank etc. v. Hagner, 1 Pet., 455, 465-6.

This Court (over which Chief Justice Marshall then presided) seemed to consider the latter possibility sufficient argument as *reductio ad absurdum.*

That case was quoted, and its rule followed in California before the adoption of the Codes.

Hill v. Grigsby, 35 Cal., 656, 662.

**2. There is an entire absence from the contracts of any *express* provision, clear or otherwise, that the lands need not be conveyed when the balance of the purchase price is required to be paid.**

**3. The contracts do not, clearly or otherwise, indicate that the lands need not be conveyed cotemporaneously with the enforced payment of the balance of the purchase price.**

The contracts contain nothing from which we may surmise, much less infer, that the buyer must

buy and pay for in full at the termination of five years, but that the seller need not sell or convey at that time, nor at any specified or defined time, nor at any time which is practically capable of being determined or limited, although boldly so claimed by the defendant in error.

**To the contrary, the contracts plainly indicate that the final payment shall be withheld, as in suspense, until it be known *whether the seller can convey at all*, or be under any obligation to convey; and that the period of that suspense shall be five years.**

In the construction of a contract, any ambiguous or doubtful provision will (1) be resolved against the maker of the instrument,[32] (2) the provision will be given a reasonable and fair operation as to the parties and subject-matter,[33] and (3) for that purpose all things by law or usage considered as incidental to a promise and its fulfillment, will be implied and read as if forming a part of that promise.[34] The parties to a contract will be assumed to be intelligent as to their respective interests as therein involved, and prudent and alert to protect them. We cannot, however, assume that they—especially he who signs a contract in form already prepared by the other party—will always clearly express his intent and ex-

[32]Civil Code, Sec. 1654. [33]Ib., Sec. 1655. [34]Ib., Sec. 1656.

pectation as to incidentals which he thinks necessarily follows the main promise. The observation of every lawyer and judge forbids such an implication; for the great majority of litigated cases grows out of the omissions in contracts of just such intent and expectation of one or the other of the parties. Indeed it is because of that very condition of things that the rule declared in said Sec. 1656 was adopted.

The average or representative man buys land either for improvement and use, or for barter. For either purpose it is essential that he have the land. And when he buys and pays for it he expects to get it. Indeed it is the universal expectation, not alone of buyers, but of the public generally, that one gets what he has bought immediately upon paying for it. That, as a matter of fairness, as well as prudence, one should not pay for a thing until he gets it.

With the aid of the rules of construction mentioned—usage and natural expectation implied, an interpretation which will make the doubtful or disputed provisions operate reasonably and with fairness, and any still lingering doubt resolved against the maker of the instrument—let us read the contracts.

Upon the point of amount and time of payment, the contracts are clear and specific. The vendee agrees to buy a tract of land at the price of

$25,852.50. He paid down one-fifth of that price, and agreed to pay the remainder within five years, and annual interest in advance on that remainder at the usual rate for loans of money. The transaction is, therefore, on the buyer's part, the equivalent of a present cash payment of entire purchase price. What, then, was the purpose of deferring payment of so large a portion of the price? A further reading of the contracts affords an explanation. *The vendor has no title to the lands, and cannot, therefore, convey.* If the vendee paid in full, he could not get his purchase. He could not even get possession *ad interim*, for the lands were then part of the public domain, open to settlement by, and sale to the public. The *permission* to take possession given him by vendor was of no efficacy whatever, and the vendor is prudent enough to expressly repudiate any obligation on its part to give or retain him in possession, or to "be responsible to him for damages, or costs, in case of his failure to obtain and keep such possession." In fact the vendee did not get possession. Indeed, as a prudent man, he would not dare to take possession if he could; for possession, to be of use, would necessitate improvement, and in case of final refusal of patents he would not only lose his improvements, but be responsible for the value of the use of the lands. For the contracts further declare that while the vendor claims that the lands

are part of a grant to it by the United States, patents for them have not yet been issued; that "it will use ordinary diligence to procure patents for them;" but that as it sometimes happens that the Government will not acknowledge its claims for, and in consequence it fails to get patents, "nothing in this instrument shall be considered a guarantee or assurance that *patent or title* will be procured." And it will be noticed that the "ordinary diligence" is not to be exercised in getting patents or title in *any* mode, or from *any* source, but only in acknowledgment of its claim of gratuitous grant from the United States.

With these facts before us, and before the parties to the contracts, little doubt remains of the purpose of the enforced deferred payment. The seller contemplated that it would be expected of, and incumbent upon it to convey when the price was paid. It could not then convey, but hoped, and, perhaps, expected to be able to convey within a few months, or a year at the farthest. It was as desirous of obtaining the price as the buyer was of obtaining the land. In the ordinary course of business a patent would issue within a year after application for it. It surely, and beyond any possible doubt, would issue within five years, if ever. It would be safe, therefore, to *require* the buyer to close the transaction on his part at the termina-

tion of that period, since the seller would then, if ever, be able to comply with its concurrent duty to convey. It was desirable to close the transaction on both sides as early as possible, but as the seller did not, for the reasons stated, dare to *force* the buyer to an earlier performance, the contracts provided that he *might* close the transaction *as much earlier* "after a receipt of a patent," as he might choose.

Thus far we have considered the matter of the purpose of the enforced deferred payment (and consequent meaning of the five years clause) from the seller's standpoint only.

What were the buyer's purposes in deferring the payment of eighty per cent of the purchase price, and what his understanding of the five years clause?

He knew (1) that he might not get possession of the lands; (2) that the seller and, therefore, he, might never get the title to them; (3) that the time when it *could* be finally determined whether the seller would or would not get patent was necessarily uncertain; (4) that in the meantime he must actually part with one-fifth of the large price and pay interest on the remainder; (5) that, since he might never be able to acquire title, he could not, prudently improve so as to profitably use them, nor barter, nor sell, nor otherwise gain profit from them until patent had actually issued; (6) that he

could receive no compensation by way of damage if the seller finally became unable to convey or, in the *interim*, to give possession, or for loss of improvements if in possession, since he had not agreed absolutely to give either title or possession; (7) that no compensation for the seller's use of the buyer's money actually advanced was to be given him; and (8), that for the return of such moneys as might have been advanced to the seller he had no security. The ordinary security for the return of moneys paid on account of the purchase by a buyer in possession—a lien upon the lands (or equity in them, as respondent calls it)—was entirely absent in this case, since a lien for performance of the seller's obligation would not attach to lands belonging to a stranger to the contract. It does not appear that the buyer supposed, or had any reason to suppose, that the seller was a wealthy and responsible corporation on whom he might safely rely to return any large sum of money. If its solvency was then beyond question, would that condition remain during the long period during which it was entitled to retain the money? And even if its then, and continuing, solvency were established, would it not have been an unusual and extraordinary thing to advance it $34,940.36 (the price, with five years' stipulated interest), without any security for its return, save the seller's supposed solvency?

Under those circumstances—considering that the buyer had, in expectation of getting the lands within that time, advanced, without interest in case of return, one-fifth of the purchase price of the land for a period not exceeding five years, is it credible that, with such expectation of getting the lands diminished by five years' failure, he agreed to advance the other four-fifths—a sum exceeding $20,000—for a further and absolutely indeterminable period, without interest for its use, or security for its return? Had such an alleged contract been oral, how much direct and specific testimony would a jury require to establish it? And yet defendant in error claims that the contracts so read by implication! If the contracts clearly expressed such an agreement, they should be declared void for want of mental capacity in the buyer.

Just think of it! The buyer must (says the seller) pay his money—the entire purchase price—and wait for possession and title, until it be "finally determined" whether the seller shall get patents. How determined? First, by the local Land Office; then on appeal to the Commissioner; from him to the Secretary of the Interior. Will the decision of the Secretary be a "final determination?" Not at all. When the applicant became tired or discouraged there, it still had (says respondent) a resort to the courts. The Circuit Court might entertain its bill, it says, or dismiss it.

Then an appeal or writ to this Court, and in course of time a decision which, respondent admits, would be a "final determination" of its right to patents. Provided, of course, that the bill had not been dismissed for want of jurisdiction to dictate to the Department of the Interior. In the latter case the seller might, after its defeat in Court, wait until patents for the lands had been issued to actual settlers, and then bring suit to have it declared that such settlers held their patents in trust for complainant. When, then, would a "final determination" of the matter probably be had? Would the buyer, or even the seller, be then in existence, and who would then enjoy the land, or, if patents refused, the fun of getting back the buyer's little fortune from the Southern Pacific Railroad Company—assuming its fifty year corporate life to have been renewed?

It is, we repeat, incredible that a buyer would make an agreement which could operate in such an utterly unreasonable, unfair, and to him disastrous manner; and no instrument should be construed as containing such an agreement where not expressed in the most clear and incontrovertible language. Of course these contracts contain no such language.

A conviction of the correctness of the construction given that provision of the contracts by the California Supreme Court in department is abso-

lutely unescapable: I will give you $25,852.50 for the lands you claim, provided you get patents for them in five years. In consideration of your tying up the sale of them to me, I will give you the use of one-fifth of the purchase money and the use of all of the annual interest at seven per cent on the remaining four-fifths while unpaid. That remainder shall be paid in five years, and I am at liberty to pay it sooner if you have the patents. If you don't get the patents, then at the termination of five years you shall return me all the money which I paid you, but without any interest for its use—was the offer made and accepted. And a very safe and profitable contract it was for the seller. Under it the Railroad Company had the free use of part of principal, and interest on balance, for a period of five years—the practical equivalent of $3,981.06—and didn't have to do a thing in return. A contract to sell what the seller has not, may never have, and is under no liability for failure to acquire, is very safe and profitable, indeed.

**4. Under the provisions of the California Civil Code an independent covenant to pay, regardless of ability to convey in return, is made non-enforceable, and is therefore impliedly prohibited.**

" An agreement for the sale of property cannot be specifically enforced in favor of a seller who

cannot give the buyer a title free from reasonable doubt."

Sec. 3394 Civil Code of California.

Defendant in error says that the buyer must pay, although the seller has then no title at all. The Civil Code says that the buyer need not pay if the seller cannot give a title free from reasonable doubt.

**5. If there is no time for performance specified in the contract, or if the time specified be uncertain, or of uncertain period, as where fixed at the occurrence of an event, the time of which occurrence is incapable of measurement or maximum or minimum limitation, the law will require performance in *a reasonable time.***

Williston v. Perkins, 51 Cal., 554;
Vance v. Pena, 41 Cal., 686;
Nunez v. Dautel, 19 Wall., 560.

The events, upon the occurrence of which performance become due under the specifications of the contracts in the above cases, were (1) " when the schooner is sold," (2) " in case said Pena shall not be able to procure a conveyance," and (3) " as soon as the crop can be sold, or the money raised from any other source." The events named were disregarded and a " reasonable time " allowed for the performance.

Applying that rule of reasonable time to the transactions in this case, we cannot well escape the conviction that five years was a goodly long, and more than reasonable, time within which to procure the required patents. In the ordinary course of business, as before suggested, a patent will be issued or refused within one year after the application had been made. And considering all the circumstances of this case—that the buyer *might* close the transaction at any time after the contract if the patents had then been procured, and that he *must* close it at the termination of five years, the natural expectation of receiving the land when fully paid for, and that such receipt of the thing bought usually follows as incidental to the payment for it—no error, we submit, can be made in holding the five years, not only as a necessary intendment of the contracts as to the time when the patents must be issued, but also a reasonable time within which the patents must have been procured.

Indeed, it is an extraordinarily liberal time. Reasoning from the natural propriety of the rule as well as on analogy with adjudicated cases it may be said that anything in excess of two years (double the usual time required) within which to procure the patents would be unreasonable; and that had the buyer, at any time after the expiration of two years, tendered the unpaid remainder

of the purchase price and demanded a deed, he would, upon the refusal to convey, be justified in rescinding the contracts. The "reasonable" time is that period which, in the contemplation of the parties, or, in the absence of any circumstance to show such contemplation, in the opinion of the Court or jury would probably be required for the performance of the act. And if such period be uncertain and might be greatly prolonged, then the law will disregard the whole stipulation as to time and hold a present performance necessary.

In a recent Pennsylvania case (Kearny v. Hogan, 154 Pa. St., 112-115) the Court approved the finding of the jury that a delay of two months was an unreasonable time within which to remove an easement from the property, and said:

"A purchaser of real estate is not bound to wait an indefinite time, and keep his money unemployed to enable the vendor to clear his property of incumbrances. Where such incumbrance consists of a judgment or mortgage it can be removed at once by an application of a portion of the purchase money to its payment. But an incumbrance of the character of the one in this case cannot be removed in a summary manner. It may require a month, or it may require a year, and it is unreasonable to expect the vendee to hold himself in readiness to meet his contract for an indefinite period."

If in that case the vendee not only kept his money unemployed, but had given its use to the vendor without charge and without security for its

return, would the language of the Court have been less emphatic as to the unreasonableness of the delay?

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## VI.

### It had been "finally determined" that patents would not issue to the Southern Pacific Railroad Company.

*a.* In March, 1867, by order and proclamation of the Secretary of the Interior, the lands here in question were withdrawn from sale and private entry. The purpose of that withdrawal was to enable the United States to give the Southern Pacific Railroad Company indemnity for losses in the grant, and the very act of withdrawal was a voluntary dedication or reservation of the lands to that purpose. It had no other legal effect. It gave neither title nor lien to the Railroad Company. It in no way enlarged the terms of the Act of Congress which, as this Court has said, "passed no title, and until executed created no legal interest"—in the Railroad Company.

Such formal withdrawal was essential to release the land from the right of private entry.

Revised Statutes (Sec. 2281) provides that the land shall be subject to private entry until actual withdrawal.

Act of April 21, 1876 (19 Stat., 35), permits right of private entry until publication of notice of withdrawal.

Act of January 13, 1881 (21 Stat., 315), and Sec. 3 of Act of March 3, 1887 (24 Stat., 556), recognize the practice and propriety of such withdrawals.

It has been contended that the Act of July 27, 1866, of itself withdrew the lands by its declaration that "the sections hereby granted" should not be subject to sale or private entry, but a perusal of the Act will bring ready conviction that the "sections hereby granted" in Sec. 6 mentioned are, as there stated, the odd-numbered sections within twenty miles on each side of the railroad by the Act expressly granted.[35]

Indeed the matter has been removed from the domain of discussion:

"The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation."

N. P. R. Co. v. Musser Co., 168 U. S., 604, 607.

In August, 1887, the Secretary of the Interior, by order and proclamation, revoked the order of

[35] See our point "II c."

withdrawal of March, 1867, and restored the land to the public domain for private entry.

Trans., folio 40, p. 12;
Letter of Secretary Lamar,
6 Dec., Dept. of Int., pp. 84-92.

**That order was within the power of the Secretary of the Interior.**

Act of April 21, 1876 (19 Stat., 35), impliedly grants such power.

Act of January 13, 1881 (21 Stat., 315), contemplates such a restoration.

Act of March 31, 1887 (24 Stat., 556), gives the Secretary of the Interior general power in the adjustment of railroad land grants.

In August, 1887, the grant to the Southern Pacific Railroad Company was subject to forfeiture for breach of condition subsequent.

The Act of July 27, 1866 (Sec. 8), required the railroad to be completed by July 4, 1876. It was not in August, 1887, nor is it yet completed.

See letter of Secretary Lamar, ante.

**The revocation of the order of withdrawal of the lands and their restoration to the public domain for private entry was in effect a denial of the right of the Railroad Company to resort to or select them for indemnity purposes.**

The revocation of that order revoked also the dedication or reservation of the lands for railroad

indemnity by that order implied, and was a plain refusal to longer subject the lands to a right of resort thereto by the Railroad Company for indemnity or other purpose.

The act of the Secretary was the act of the United States, and it was not a violent exercise of sovereignty to determine that the Railroad Company had forfeited any claim or expectation it might have had to resort for indemnity to the land so restored to the public domain. Under such circumstances the intention of the United States to deny the railroad claim may be expressed in any informal way—"such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object."

A. & P. R. R. v. Mingus, 165 U. S., 433.

That refusal of the Secretary of the Interior to recognize any claim of the Railroad Company to the lands restored to the public domain was in its nature a final determination that patents for those lands would not issue to the Company. Like any other judgment it was final until reversed or overthrown.

**b. A final determination that the patents could not be obtained was made by the lapse of the time within which the patents must, under the intendments of the contracts, be procured.**

This point depends upon the correctness of our contention in point V a herein, that performance—payment and delivery—were concurrent acts, and that as the buyer must pay at the termination of five years, the seller must be prepared to convey at that time.

We trust that the Court has already perceived that is not a mere case of attempted escape from a bad bargain. Ordinarily the buyer gets what he sought and paid for. Here the buyer got nothing, neither title nor possession. And we submit that a seller's attempt to exact the price of a thing which he has neither sold nor delivered is not entitled to any unusual aid from a court of equity.

The judgment in this case imposes a forfeiture—a forfeiture not alone of the buyer's right of purchase, but also of all his moneys advanced on account of that purchase. And that forfeiture is based upon an implied condition—a condition not found in the contracts, but supplied by the Court. Yet the statutory law of California, which should

control the action of the Court, is that

"A condition involving a forfeiture must be strictly construed against a party for whose benefit it is created."

Sec. 1442 of Civil Code of California.

In contemplation of the provisions of that section, and of the unvarying rule that equity will never aid a forfeiture, should a court of equity, in a suit in equity, not only aid a forfeiture but imply (create?) the condition upon which that forfeiture is based?

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